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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-733

JOHNNIE WILSON and SHIRLEY WIGHT,

Petitioners,

against

UNITED BENEFIT LIFE INSURANCE COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH P. HENNESSEY
8 Selvidge-Babcock Building
Billings, Montana 59101

Counsel for Petitioners

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No._____

JOHNNIE WILSON and SHIRLEY WIGHT,

Petitioners,

-vs-

UNITED BENEFIT LIFE INSURANCE COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on July 23, 1973.

OPINIONS BELOW

The findings of fact, conclusions of law and direction for judgment of the District Court of the District of Montana, Billings Division, holding the policy of life insurance on the life of the late William Edward Wight null and void is found in Appendix "A." The opinion of the Circuit Court of Appeals

affirming the judgment of the District Court is found in Appendix "B."

JURISDICTION

The order and decision of the United States Court of Appeals was entered on July 23, 1973. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(1) Did the Court of Appeals err in affirming the judgment of the United States District Court for the District of Montana, based upon its findings of fact, conclusions of law and direction for judgment, which found that the policy of insurance was null and void due to the misrepresentations in the applications for reinstatement?

(2) Did the courts below err in not considering the post application conduct of the Respondent, and evidently concluded that the post application conduct did not amount to waiver or estoppel?

STATUTES INVOLVED

Section 40-3713, Revised Codes of Montana, 1947, provides:

> "*Representations in Applications.* All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless either:
>
> (a) Fraudulent; or
> (b) Material either to the acceptance of the

risk, or to the hazard assumed by the insurer; or
(c) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract in as large an amount, or at the same premium or rate, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise."

Section 40-3812, Revised Codes of Montana, 1947, provides:

"*Reinstatement.* There shall be a provision that unless:

(1) The policy has been surrendered for its cash surrender value, or
(2) Its cash surrender value has been exhausted, or
(3) The paid-up term insurance, if any, has expired, the policy will be reinstated at any time within three (3) years (or two (2) years in the case of industrial life insurance policies) from the date of premium default upon written application therefor, the production of evidence of insurability satisfactory to the insurer, the payment of all premiums in arrears and the payment or reinstatement of any other indebtedness to the insurer upon the policy, all with interest at a rate not exceeding six per cent (6%) per annum compounded annually."

Section 40-3828, Revised Codes of Montana, 1947, provides:

"*Incontestability, limitation of liability after reinstatement.* (1) A reinstated policy of life insurance or annuity contract may be contested

> on account of fraud or misrepresentation of facts material to the reinstatement only for the same period following reinstatement and with the same conditions and exceptions as the policy provides with respect to contestability after original issuance."

Section 13-905, Revised Codes of Montana, 1947, provides:

> "*Recission--how effected.* Recission, when not effected by consent, can be accomplished only by the use on the part of the party rescinding, of reasonable diligence to comply with the following rules:
>
> 1. He must rescind promptly, upon discovering the facts which entitled him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind."

STATEMENT OF THE CASE

Petitioners brought an action to recover $50,000 for John Wilson on a life insurance policy issued by Respondent on the life of William Edward Wight, deceased, and $50,000 on the accidental death benefit part of the same policy for Shirley Wight. There is diversity of citizenship between the parties and the amount in controversy exceeds $10,000. The basic facts are not in dispute. The policy of insurance was issued on January 23, 1967. (Paragraph 2, petitioners' Amended and Supplemental Complaint, admitted Paragraph 1, First Claim, First Defense of Respondent's Amended Answer.)

Prior to the issuance of the policy, deceased's drinking habits had been reported to Respondent and Respondent had conducted an extra investigation (Tr. 159). The policy lapsed

for non-payment of premiums at various times and applications for reinstatement of the policy were prepared and submitted to Respondent on January 12, 1967, September 3, 1967, January 8, 1968 and July 1, 1968. The policy was reinstated each time (Tr. 22, Defendant's Exhibit "A"; Tr. 23, Defendant's Exhibits "B," "C" and "D"). Exhibits "A," "B" and "C" were written by George Lund, an agent for Respondent company (Tr. 79-82).

The deceased was in the Holy Rosary Hospital in Miles City, Montana, from August 30 to September 1, 1967, under the care of M. D. Winter, M.D., who treated him for stress and over indulgence in alcohol (Deposition of M.D. Winter, pages 6 and 7). Dr. Winter, at pages 10 and 11 of his deposition, on cross-examination, testified as follows:

"Q. But, other than running a cardiogram, you did check his heart, did you not?

A. Yes. I listened to his heart and it sounded normal. I questioned if whether he should have a cardiogram.

Q. And you came then to the conclusion that his heart was normal, at that time?

A. At that time, yes.

Q. Do you make routine physical examinations for life insurance companies?

A. Yes, I do.

Q. Would the examination you made of Mr. Wight be the type of an examination you would make for a life insurance company?

A. Actually a little more comprehensive than a life insurance company examination.

Q. The physical you gave him was more com-

prehensive than an average life insurance examination?

A. Yes.

Q. You were satisfied that his main body functions were normal?

A. Yes.

Q. Is one of the life insurance companies that you make routine examinations for the United Benefit Life Insurance Company of Omaha, Nebraska, if you can remember?

A. You would have to check with Mr. Fry. They are quite infrequent.

Q. Are you acquainted with a Mr. George Lund in Miles City?

A. Yes.

Q. Have you made physical examinations at his request?

A. Yes, I have.

Q. And at the request of Mr. Lund, then, you have made physical examinations on clients of his for the companies that he would represent?

A. Correct."

That on the date of September 3, 1967, the application for reinstatement of the policy designated herein as Respondent's Exhibit "B" was filled in by George Lund, as agent for the Respondent (Tr. 79-82); that no. 2 of said application reads as follows:

"2. Since the issuance of the policy, have you had any illness or injury, or have you consulted, or been treated by any physician, or surgeon?

No. If so, give the following information.

Nature of Illness, Injury or Medical Treatment	Date	Duration	Is Recovery Complete	Names and Addresses of All Doctors Consulted
		None		

That on page 131 of the transcript George Lund gave the following testimony on cross-examination:

"A. Well, whenever I wrote a reinstatement he appeared to be in good health to me, and I asked him the questions, and that was it.

Q. You knew him personally, did you not?

A. Yes, I did.

Q. And the time or two he had been to the Doctor, he did disclose this to you, did he not?

A. Yes. I know on the one application he had the flu.

Q. And when that hospital application was made, he had disclosed to you he went to Doctor Winters, hadn't he?

A. I believe so. I don't recall. I would have to look.

Q. As far as you know, he did honestly disclose his condition to you?

A. Yes, Sir."

That on April 4, 1968, William Edward Wight made application for insurance with Mutual of Omaha, which application was filled in by George Lund (Tr. 131; Petitioner's Exhibit 2).

In that application it was disclosed that the deceased, in 1967, was three days with nervous exhaustion and was attended by Dr. M. D. Winter.

Respondent is an affiliate of Mutual of Omaha and Mutual of Omaha owns in excess of fifty per cent of Respondent company (Tr. 144). The two companies advertise together, use the same legal department and office in the same building in Omaha, Nebraska (Tr. 160-161).

On March 12, 1968, application for reinstatement, marked Exhibit "C", was filled in by George Lund, and he wrote: "Flu 1967, three days, full recovery, Dr. L. A. Campodonico, Miles City."

The insured, William Edward Wight, died on September 13, 1968 (Exhibit in deposition of J. B. Simpson, M.D.). Due proof of death was furnished to Respondent on November 15, 1968 (Tr. 11-12). Payment was denied (Tr. 18-19; Respondent's Exhibits "E" and "F").

The case was tried to the United States District for the District of Montana, Billings Division, without a jury, and on February 16, 1971, the Court entered its findings of fact and conclusions of law in favor of Respondent, United Benefit Life Insurance Company (Appendix "A"). The decision was appealed to the United States Court of Appeals for the Ninth Circuit and that Court affirmed the judgment of the District Court (Appendix "B").

REASONS FOR GRANTING THE WRIT

The decisions of the court below in this case are based on their interpretation of the law of the state of Montana. The decision of the Court of Appeals should be reviewed because it

is in conflict with the law of the state.

I.

In order for the court below to find in favor of the Respondent, it was necessary for it to find that the policy, when originally issued, was void ab initio, or that at the time of one or more reinstatements of the policy the same became void ab initio. *McLane v. Farmers Insurance Exchange*, 150 Mont. 116, 432 P.2d 98 (1967).

Neither the Respondent nor the courts claim the policy was void at the time of its issuance on January 23, 1967. Respondent claims it was void because of fraud or misrepresentation in the applications for reinstatement of September 3, 1967 (Respondent's Exhibit "B"), January 8, 1968 (Respondent's Exhibit "D") and July 1, 1968 (Respondent's Exhibit "C"). In order to declare the policy void following the death of Wight, it is necessary that the Respondent meet the requirements of Section 40-3713 and Section 13-905, Revised Codes of Montana, 1947. *McLane v. Farmers Insurance Exchange,* supra.

Under Section 40-3713, Revised Codes of Montana, 1947, in order to prevent recovery by the plaintiff, it was necessary for the Respondent to prove one or more of the three applications relied on were either: "fraudulent; or material either to the acceptance of the risk, or to the hazard assumed by the insurer; or the insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract in as large an amount, or at the same premium or rate, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise."

Good faith is presumed and fraud is never presumed and

must be proved by satisfactory evidence. *Reilly v. Maw*, 146 Mont. 145, 405 P.2d 440 (1965); *Hjermstad v. Barkuloo*, 128 Mont. 88, 270 P.2d 1112 (1954).

In order to prove fraud, mistake or misrepresentation in Montana, it is necessary to prove the same by clear, convincing and satisfactory evidence. *Parchen v. Chessman*, 53 Mont. 430, 164 Pac. 531 (1917); *Sullivan v. Marsh*, 124 Mont. 415, 225 P.2d 868 (1950).

The evidence presented in this case does not show fraud or misrepresentation which would come within the requirements of Section 40-3713, Revised Codes of Montana, 1947.

The Respondent's agent Lund filled in the applications marked Respondent's Exhibits "A," "B" and "C." At the time of filling the same out, Lund knew Wight, his habits and physical condition. He had an opportunity to observe Wight on each occasion. Lund himself filled in Petitioners' Exhibit 2, the application for health insurance with Mutual of Omaha, and in the same the fact was disclosed that in 1967 Wight had been treated by Dr. M. D. Winter three days for nervous exhaustion. They showed that Lund had to have the information concerning Wight's illness,

Lund further testified that as far as he knew Wight honestly disclosed his condition.

While Petitioners' Exhibit 2 was an application made to Mutual of Omaha, this company was an affiliate of the Respondent and owned over fifty per cent of its stock, and the evidence showed that they office in the same building, use the same legal staff and advertise together. If the Respondent had investigated, it would have easily discovered the facts concerning Wight's hospitilization and treatment in August and September of 1967.

The Respondent relies on the testimony of its Assistant Chief Underwriter, A. C. Martin Nelson, to prove that if they had known the facts concerning Wight's hospitalization and treatment, the company would not have reissued the policy.

It should be noted, though, that the Respondent did not attempt to rescind the policy until several months after Wight's death. In the meantime, following the reinstatement of the policy after the application of September 3, 1967 (Respondent's Exhibit "B"), the Respondent had repeatedly accepted payments on the policy and twice had reinstated the policy, although informed by the application (Respondent's Exhibit "C") that Wight had been treated in 1967 by Dr. L. A. Campodonico, a partner of Dr. M. D. Winter.

Assuming arguendo that this Court will hold that the trial court was correct in finding fraud or misrepresentation, the determination of whether the policy was void ab initio depends on Respondent's conduct after each reinstatement. *McLane v. Farmers Insurance Exchange*, supra; *Travelers Insurance Company v. Wilhelm, et al.*, (U.S.D.C. Mont. 1973), 30 St. Rep. 205 (found in Appendix "C").

On reinstatement of the policy, the Respondent had the duty to investigate the insurability of the deceased within a reasonable time. *McLane v. Farmers Insurance Exchange*, supra. The Respondent's Assistant Chief Underwriter admitted the company had to delve into the same aspects on the reinstatement of a policy as on the original issuance of the policy.

Following the application of September 3, 1967, Respondent had more than a year to make the investigation, and following the application of January 8, 1968, Respondent had over eight months to make the investigation.

In *Travelers Insurance Company v. Wilhelm*, supra, the Court held that reasonable time to investigate the policy had lapsed when fifty days had elapsed between receipt of the application and the accident.

There is nothing showing that any investigation was made until after November 15, 1968, following decedent's death.

In the meantime, Respondent had continued to accept premiums when, if a proper investigation had been made, the Respondent could have easily discovered that Wight had been hospitalized prior to the application dated September 3, 1967.

The language in *Travelers Insurance Company v. Wilhelm*, supra, although it involves an automobile accident policy, is particularly applicable here, where at page 208 the Court said:

> "Even if plaintiff actually did not know the true status of Wilhelm's insurability, it should have known. On the peculiar facts of this case, plaintiff must be held to be equitably estopped from asserting rescission under R.C.M. 1947, Section 40-3713. The conclusions that either plaintiff knew the truth and accepted the risk or that its failure to know was a result of its own fault are inescapable here."

If the insurer did investigate and discover that the decedent had been hospitalized and that he had fraudulently or by misrepresentation not had that included in the application of September 3, 1967, the Respondent had the duty to immediately rescind.

In *McLane v. Farmers Insurance Exchange*, supra, the Court held that a motorist injured by the negligence of an insured was entitled to recover under the insurance policy even though the insurance company was entitled to rescind the

policy for violation of Section 40-3713, Revised Codes of Montana, 1947, since the insurance policy was effective until rescission and since subsequent to discovering insured's fraud, the insurance company acted affirmatively in accepting premium payments, which constituted implied waiver of the right to rescind.

The trial court in its findings of fact and conclusions of law never mentioned waiver, estoppel or the Respondent's post application conduct.

Under the facts herein, it is necessary for there to be a determination as to whether or not the post application conduct of the insurer amounts to waiver or estoppel.

The Court of Appeals does not go into waiver or estoppel. Its entire opinion is predicated upon *American Indemnity Company v. Elespuru*, 302 F.Supp. 878 (U.S.D.C. Mont. 1969). The *American Indemnity* case is primarily an interpretation of Section 40-3726, Revised Codes of Montana, 1947, as amended, and that section of the Montana code specifically, in subsection (4) thereof excludes life or disability insurance. Section 40-3713 was quoted in *Elespuru* to show its relationship to Section 40-3726 as to what constituted misstatements in an oral binder that would preclude issuance of a policy of insurance. The Court said:

> "In the *Harris* and *Universal Underwriters* cases, supra, the policies had been issued, and there is, substantial reason to hold that the language of section 17 has the effect of integrating the contract and neutralizing any representations not contained in the policy itself. Those reasons do not apply in the case of the binder. Harris vs. State Farm Mutual Automobile Insurance Company, 232 F.2d 532 (6 Cir. 1956); Universal Underwriters Ins. Co. v. Snyder, 81 Nev. 315, 402

P.2d 483 (1956).

"Generally by the time a policy issues, the insurer has examined the risk or at least had an opportunity to examine it. When that is true it may well be that the insurer, by specifying certain declarations in the written contract, does bar itself from relying on others. American Indemnity Company v. Elespuru, 302 F. Supp. 878 (1969) (D. Montana).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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/s/ Joseph P. Hennessey

Counsel for Petitioners

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

JOHNNIE WILSON and SHIRLEY WIGHT, Plaintiffs, -vs- UNITED BENEFIT LIFE INSURANCE COMPANY, a corporation, Defendant.	Civil No. 812 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DIRECTION FOR JUDGMENT

This cause was tried to the court, sitting without a jury, on November 12, 1970. Plaintiffs appeared through their counsel, Joseph P. Hennessey, and defendant appeared through its counsel, William H. Bellingham. Time for filing post-trial briefs was granted. The matter is now submitted to the court for decision.

Having considered the testimony, exhibits, and applicable law, the court now makes the following

FINDINGS OF FACT:

1. That defendant is a Nebraska corporation, authorized to do business in the State of Montana. Plaintiffs are residents of the State of Montana. The amount in controversy exceeds $10,000 exclusive of interest and costs.

2. That defendant issued a policy of insurance in writing, dated January 23, 1967, on the life of William Edward Wight. The policy provided for benefits in the amount of $50,000 to be paid to plaintiff Johnnie Wilson upon due proof of the death of the insured.

3. That the insured, William Edward Wight, died on September 13, 1968. Due proof thereof was furnished to defendant on November 15, 1968.

4. That defendant has not paid any benefits under the policy of insurance.

5. That the policy lapsed for nonpayment of premiums at various times. Applications for reinstatement of the policy dated January 12, 1967, September 3, 1967, January 8, 1968, and July 1, 1968, were prepared and submitted to defendant. On each occasion defendant reinstated the policy of insurance.

6. That the representations and statements contained in the applications for reinstatement dated September 3, 1967, January 8, 1968, and July 1, 1968, pertaining to the health of William Edward Wight and to medical treatment, recovery, and names and addresses of treating doctors were incomplete and false and constituted misrepresentations and concealment of facts material to the reinstatements of the policy. The misrepresentations were made knowingly and with intent to deceive defendant. Defendant in good faith would not have reinstated the policy on each occasion if the true facts had been known to it as required by the applications for reinstatement.

7. That the application for reinstatement dated September 3, 1967, was made on the same day that the insured William Edward Wight was released from the Holy Rosary Hospital in Miles City, Montana, for treatment of a situation anxiety reaction and excess consumption of alcohol.

8. That immediately after learning the true facts pertaining to the applications for reinstatement and on or about December 18, 1968, defendant gave notice to plaintiffs that the reinstatements of the siad policy were null and void and that the policy

had been rescinded. Defendant refunded all premiums owing plaintiffs under the terms of the policy in the amount of $848.40.

Based upon the foregoing Findings of Fact, the court now makes the following

CONCLUSIONS OF LAW:

1. That this court has jurisdiction because complete diversity of citizenship exists and the matter in controversy, exclusive of interest and costs, exceeds $10,000.

2. That the misrepresentations and concealment of facts in the applications for reinstatement dated September 3, 1967, January 8, 1968, and July 1, 1968, were made knowingly and with intent to deceive defendant and were material to the acceptance of the risks assumed by defendant in the policy as reinstated on each occasion. The affirmative defenses set forth in defendant's amended answer to plaintiffs' amended and supplemental complaint constitute valid legal defenses to the claims of plaintiffs.

3. That since the policy of life insurance is null and void due to the misrepresentations in the applications for reinstatement, the accidental death benefits of the policy are likewise null and void. It is therefore unnecessary to decide whether the death of the insured, William Edward Wight, resulted from a bodily infirmity or from a bodily injury sustained through accidental means.

4. That defendant is not liable to plaintiffs under the terms and provisions of the policy of insurance and plaintiffs are not entitled to a recovery under the policy.

IT IS THEREFORE ORDERED that the clerk of this court enter judgment in favor of defendant and against plaintiffs in this case.

Done and dated this 16th day of February, 1971.

James F. Battin
United States District Judge

Filed: February 16, 1971
John J. Parker, Clerk
By Mary C. Tuttle, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

(Title omitted in printing)

JUDGMENT

This action came on for trial before the Court, Honorable James F. Battin, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the clerk of this court enter judgment in favor of defendant and against plaintiffs.

Filed, entered and noted in Civil Docket Feb 16, 1971

JOHN J. PARKER, CLERK
By Mary C. Tuttle, Deputy

Dated at Billings, Montana, this 16th day of February, 1971.

JOHN J. PARKER
Clerk of Court

By Mary C. Tuttle
Deputy Clerk

EXHIBIT B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

JOHNNIE WILSON and SHIRLEY WIGHT,	)	
Appellants,	)	**NO. 71-2009**
-v-	)	
UNITED BENEFIT LIFE INSURANCE COMPANY, a corporation,	)	**MEMORANDUM**
Appellee,	)	

Appeal from the United States District Court
District of Montana

Before: KOELSCH, WRIGHT and KILKENNY, Circuit Judges.

A study of the record convinces us that the findings of the District Judge are not clearly erroneous. The law of Montana governs and is succinctly stated in American Indemnity Co. v. Elespuru, 302 F. Supp. 878 (D. Mont. 1969).

The cases of Montana Auto Finance Corp. v. Federal Surety Co., 85 Mont. 149, 278 P. 116 (1929), and Pelican v. Mutual Life Ins. Co., 44 Mont. 277, 119 P. 778 (1911), on which appellants rely, were decided on substantially different statutes. American Indemnity Co. v. Elespuru, supra, p. 880.

JUDGMENT AFFIRMED.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

(Title omitted in printing)

Appeal from the United States District Court
District of Montana

ORDER

Before: KOELSCH, WRIGHT and KILKENNY, Circuit Judges.

The petition of appellants for rehearing in the above entitled cause is DENIED.

Filed Aug 15 1973
Dennis R. Mathews, Clerk
U. S. Court of Appeals

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

TRAVELERS INSURANCE CO., a corporation, Plaintiff, -vs- JOHN JR. WILHELM, MARIE WELCH and LYNANA GREEN, Defendants.	**Civil No. 1946** **MEMORANDUM OPINION AND ORDER**

For Plaintiff: Poore, McKenzie & Roth and Donald C. Robinson, Butte

For Defendants: John L. McKeon (Defendant Green), Anaconda
Knight, Dahood, McKay & McClean (Defendants Wilhelm and Welch), Anaconda

This is a declaratory judgment action by which plaintiff seeks clarification of the rights and liabilities of the parties to this action under an insurance policy. Both parties have moved for summary judgment.

The jurisdiction of the court is founded on 28 U.S.C. , Sections 1331 and 2201. The court finds that there exists an actual controversy between these parties, that there is diversity of citizenship and that the amount in controversy exceeds $10,000.00.

FACTS.

About May 12, 1970, the defendant Wilhelm applied for an automobile liability policy with First Security Agency in Anaconda, Montana, an authorized insurance broker for the plaintiff. The application was received by the plaintiff's underwriting office in Great Falls, Montana, on May 22, 1970, and, as the agent had noted that coverage was "bound", the policy in question was issued although Wilhelm had not made premium payments. Simultaneously, the plaintiff ordered two investigations of Wilhelm's insurability, one regarding his motor vehicle records with the State, the other by the Retail Credit Company regarding his insurability. The latter report was received by the plaintiff not later than mid-June of 1970.

On July 10, 1970, the insured vehicle, operated by Wilhelm, collided with that of the other defendants. In the course of a post-accident investigation, plaintiff's adjuster discovered that Wilhelm had a police record in the City of Anaconda which principally involved charges of drunkenness. Thereafter, on July 22, 1970, plaintiff notified Wilhelm that it considered the policy in question void ab initio.

The application for the policy contained two questions regarding Wilhelm's background which plaintiff alleges were falsely

answered:

> "2A. Has any company DECLINED, CANCELLED or REFUSED to renew automobile insurance for any driver during the past three years? * * *
>
> "C. Have you been CONVICTED of other than a motor vehicle violation during the past three years?"

Plaintiff contends that the negative answers Wilhelm gave to those questions constitute misrepresentations of fact sufficient to justify a conclusion that the policy was never in effect or, if in effect, are sufficient to justify rescission of the policy.

DISCUSSION

That Wilhelm did not make premium payments and that he made false statements in the application does not alter the fact that the policy of insurance issued. It was issued in express reliance on defendant's statements. Plaintiff's credit practices are not a subject of inquiry here. Therefore, the court cannot find that the policy in question did not come to fruition.

Revised Codes of Montana, 1947, Section 40-3713, provides that misrepresentation of fact in an application for insurance shall prevent recovery under the policy only where it is fraudulent or, in effect, material to the acceptance of the risk.[1] The Montana Supreme Court has treated the section as creating a right to rescind the policy, that is, cancel it retroactively. McLane v. Farmers Ins. Exch., 150 Mont. 116, 118, 432 P.2d 98 (1967). As in

---

1. The court notes that this piece of legislation was passed in 1959 and that, as a consequence, much of the prior case law applying predecessors of the section is inapposite here. See: American Indemnity v. Elespuru, 302 F.Supp. 878 (D. Mont. 1969), footnote 3.

McLane, here we may assume that the answers given are material misrepresentations within the purview of that section and still not dispose of the case. Although the facts of this case differ from those in McLane, its rationale is applicable here. As there, the issue is whether the plaintiff's post-issuance conduct bars rescission. I hold that it does.

On a continuum of plausible interpretations of the facts of this case, at one end lies the conclusion that plaintiff came to know the true status of Wilhelm's insurability and consequently insured the risk. At the other is the conclusion that plaintiff knew nothing of Wilhelm's insurability at the time of the accident. If the former is correct, plaintiff is bound by the policy. If the latter is true, plaintiff is entitled to rescission of the policy and an escape from liability to the defendants. In the latter instance, as well as under any other interpretation of the facts which justifies rescission, plaintiff may nonetheless be estopped from asserting rescission if it should have known the true status of Wilhelm's insurability. Since only the latter situation presents a conflict between these parties, it is the sole inquiry here.

The conclusion that plaintiff is barred from asserting rescission here is, of course, predicated upon the peculiar circumstances of this case. Outside the ambit of the facts, however, is the controlling question of plaintiff's duty to investigate the insurability of its policy holders within a reasonable time after issuing a policy. It is the application here of the requirement of investigation which dictates the conclusion that plaintiff is estopped from asserting rescission.

By issuing the policy, plaintiff encumbered itself with an implied right to investigate the insurability of Wilhelm. In fact, it seems clear that an automobile liability insurer owes a duty of investigation to the public at large and particularly to those who

are injured by its purported insured. Cannon v. Travelers, 314 F.2d 657 (8th Cir. 1963); Barrera v. State Farm, 79 Cal.Reptr. 106, 456 P.2d 674 (Sup.Ct.Calif., In Bank, 1969). It is equally clear that such an investigation must be complete within a reasonable time. McLane, supra, 150 Mont. at 118.

Here, regardless of whether a duty to investigate exists, plaintiff did in fact direct an investigation of Wilhelm's insurability. The investigation "did not establish anything derogatory or adverse". Although the report in question has since been destroyed, plaintiff has provided a copy of a blank form on which it was submitted. Plaintiff contends that the information upon which they would base rescission would in no case be reflected in the report. I find to the contrary. The form reflects that drinking habits, a known criminal record, and previous carriers were all subjects of inquiry. Plaintiff would seek to deny both the inquiry and the answers.

Plaintiff directed the investigation. If it was complete, it would have reflected that: (1) Six charges, two of which appear to be guilty pleas and fines and all of which involve drunk and disorderly conduct, appear in the Anaconda, Montana, police record of the defendant Wilhelm; and (2) that another insurance agent in Anaconda had refused to renew Wilhelm's automobile insurance. If it was thorough, plaintiff knew the answers on the application were false before the accident and must be held to have insured the risk. If not, plaintiff has failed to conduct a proper investigation. Even if plaintiff actually did not know the true status of Wilhelm's insurability, it should have known. On the peculiar facts of this case, plaintiff must be held to be equitably estopped from asserting rescission under R.C.M. 1947, Section 40-3713. The conclusions that either plaintiff knew the truth and accepted the risk or that its failure to know was a result

of its own fault are inescapable here. Wilhelm was a life-long resident of Anaconda. The fifty days lapsing between receipt in Great Falls of the application and accident is more than a reasonable length of time in which to conduct an insurability investigation of Wilhelm. A reasonable time to investigate has here lapsed, not necessarily because of the size of the community, but more conclusively because plaintiff had directed and received a report on an investigation. That an investigation was in fact accomplished in this time frame precludes any conclusion that it is less than a reasonable time in which to discover the information upon which plaintiff prays for rescission.

An automobile liability insurer may not postpone an investigation until the insured injures another. Nor may it employ a second investigation, prompted by the imminence of claim, to avoid its policy. Public policy militates against such a proposition. Automobile liability insurance companies compete for a highly competitive market. Once a policy is issued, both the public and the party who is insured have reasonable expectations of protection. The insurer must act within a reasonable time to verify the propriety of the issuance of the policy. Where it so acts but fails to discover relevant information which is readily available and in fact part of a public record, especially where such information is an admitted subject of inquiry, it is estopped to deny coverage to its insured's victim.

Since, therefore, no interpretation of the fact of this case will justify rescission of the policy, defendant Wilhelm is entitled to summary judgment.

Defendant Wilhelm raises the issue of his entitlement to attorney fees he incurred in this case on the theory that he has been compelled into unnecessary litigation on the policy in question. The court cannot agree. The authority Wilhelm relies on is

inapposite. The conflict between the parties is real, not susceptible to the label "unnecessary", and does not involve a question of extent of coverage but rather one of the existence of the policy. In this situation, the insured is not entitled to attorney fees.

IT IS ORDERED that defendant Wilhelm prepare and forward to the court a judgment not inconsistent with this opinion.

Done and dated this 5th day of February, 1973.

JAMES F. BATTIN
United States District Judge

AFFIDAVIT OF SERVICE

I, JOSEPH P. HENNESSEY, attorney for the Petitioners herein, hereby certify that on this 1 day of November, 1973, I served the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by mailing three copies to:

Moulton, Bellingham, Longo & Mather
Attention: Wm. H. Bellingham
Attorneys at Law
Securities Building
Billings, Montana

/s/ Joseph P. Hennessey

DEC 19 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the

United States

October Term 1973

No. 73-733

JOHNNIE WILSON and SHIRLEY WIGHT,

Petitioners,

-vs-

UNITED BENEFIT LIFE INSURANCE COMPANY, a corporation,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

The Petition for Writ of Certiorari correctly sets forth the opinions below.

JURISDICTION

The Petition correctly states that the jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

The Petitioners present two questions which they ask this Court to answer in the affirmative.

The first one in effect requests this Court to reverse the courts below on the ground that the judgment is in conflict with the law of Montana. The second question is a new one, never before argued or brought up before the courts below — did the courts below err in not considering the post application conduct of the Repondent insofar as waiver and estoppel are concerned.

STATUTES INVOLVED

The pertinent statutes are set forth in the Petition.

STATEMENT OF THE CASE

The statement of the case presented in the Petition is correct for the most part insofar as it goes. However, there are certain key facts which need further elaboration.

The crux of the case are three applications for reinstatement of the insurance policy involved, those dated September 3, 1967, January 8, 1968, and July 1, 1968 (Defendant's exhibits B, C and D), all of which form the basis for the decisions below that the insurance policy was null and void due to the misrepresentations in the said applications.

To summarize the applications for reinstatement, the insured in two of them denied any illness, medical treatment or doctors consulted since the issuance of the insurance policy and the remaining application merely states that the insured had flu for a period of three days in 1967 along with the name of the doctor consulted.

In truth, the insured had been hospitalized for a period of five days from August 30, 1967, through September 3, 1967, for treatment of a situation anxiety reaction and excessive consumption of alcohol and the attending doctor was not even the same one who purportedly treated him for the flu (deposition of M. D. Winter, pp. 5-8). It is interesting to note that on the very date of the first application for reinstatement, September 3, 1967, the insured was released from the hospital following the foregoing treatment for anxiety and excessive consumption of alcohol but the application denies any illness or medical treatment whatsoever.

It is true that at the time the insurance policy was issued, an investigation was made by the Respondent concerning the insured's drinking habits. However, the investigation revealed an irregular drinking habit many years before followed by a voluntary drinking cure by the insured on his own some six years previously with indications that he had not resumed the habit (Tr. pp. 166-168).

GROUNDS FOR DENYING WRIT OF CERTIORARI

1. *Petitioners Have Made No Showing That the Decisions Below Decided An Important or Special State Question in Such a Way as to be In Conflict with Applicable State Law.*

Only two specifications of error were raised by the Petitioners (appellants) in their briefs before the Court of Appeals for the Ninth Circuit (Brief, p. 3). These two specifications of error were that the District Court erred in its Finding of Fact No. 6 and in its Conclusion of Law No. 2.

The foregoing finding of fact and conclusion of law can be summarized as stating that the representations and statements contained in the three applications for reinstatement pertaining to the health of the insured and to the medical treatment, recovery and names of doctors were incomplete and false and constituted misrepresentations and concealment of facts material to the reinstatements of the policy and that the Respondent in good faith would not have reinstated the policy on each occasion if the true facts had been known to it (Petition, Appendix A, pp. 16-17).

The gravamen of Petitioners' argument in the courts below was that under the substantive law of the state of Montana it is necessary for an insurance company to prove a wilful intent to deceive on the part of the applicant for reinstatement in order to void the

policy (Brief, pp. 4, et seq.). Much importance was also placed upon the argument that a difference exists in the cases depending upon whether the statements of the applicant are deemed to be warranties or representations.

Petitioners in their foregoing argument failed to comprehend or point out that the Montana Insurance Code adopted in 1959 did away entirely with the distinction between warranties and representations and the decisions requiring a wilful intent to deceive have been overruled. *American Indemnity Company v. Elespuru,* (D. Mont. 1969) 302 F.Supp. 878.

The two-paragraph decision of the United States Court of Appeals for the Ninth Circuit in this case wasted no words in affirming the judgment of the trial court, using *American Indemnity Co. v. Elespuru, supra,* as authority for holding that the cases on which Petitioners relied were decided on substantially different statutes (Petition, Appendix B, p. 19).

Petitioners in their Petition still rely heavily upon the case of *McLane v. Farmers Insurance Exchange,* (1967) 150 Mont. 116, 432 P.2d 98, as they did in the courts below, as well as the case of *Travelers Insurance Co. v. Wilhelm,* an unreported case decided earlier this year by the United States District Judge who presided at the trial of this case (Petition, pp. 8-12). These cases obviously are based upon facts entirely different from those involved in this case and are of no help as

a basis for Petitioners' argument that the decision below are in conflict with the law of Montana.

Much of the Petition is made up of argument as to the effect of certain evidence (such as the testimony of the agent, Lund), all of which was decided against Petitioners in the courts below, and which add nothing in support of their argument.

There is in fact no conflict between the decisions below and applicable state law and Petitioners for the most part are merely reiterating the same arguments and law as they did below.

2. *Petitioner's Argument Regarding the Post Application Conduct of Respondent, Waiver and Estoppel Was Not Raised Before or Passed Upon by the Court of Appeals Below and Accordingly Should Not Be Considered.*

It is, of course, a long-standing rule that ordinarily issues not raised before nor considered by the Court of Appeals will not be considered by the United States Supreme Court on review. *Adickes v. Kress & Co.*, (1970) 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142.

Petitioners complain that the trial court never mentioned waiver, estoppel or the Respondent's post application conduct and that the Court of Appeals did not go into waiver or estoppel (Petition, p. 13).

There is good reason for the failure of the courts below to not pass upon waiver, estoppel and the post application conduct of Respondent. The truth is that these matters were never pleaded or argued in either one

of the courts below, the same being an entirely new approach introduced by the Petition for the first time.

In essence, Petitioners argue that even if an applicant lies about his health and makes fraudulent misrepresentations and concealments of facts, the burden then shifts to the insurer to discover the fraud regardless of the latter's knowledge of the fraud. This obviously is not and should not be the law. 3A Appleman, *Insurance Law & Practice* §2055; 43 *Am.Jur.2d,* Insurance §§1061-1062; *California-Western States Life Ins. Co. v. Feinstein,* (Cal. 1940) 101 P.2d 696.

It is obvious in this case that the Respondent insurer knew nothing of the fraudulent misrepresentations nor did it have any reason to know of them until after the insured's death whereupon it immediately took the necessary investigation and steps to rescind the policy (Tr. pp. 136-159).

It is to be noted that the District Court in its Finding of Fact No. 8 found that immediately after learning the true facts pertaining to the applications for reinstatement the Respondent gave notice to the Petitioners that the reinstatements of the policy were null and void and the policy had been rescinded (Petition, Appendix A, p. 16). The sequence of events following the last application for reinstatement lend additional support for our contention in view of the comparatively short periods of time involved. Thus the last application for reinstatement was dated July 1, 1968, death

of the insured was on September 13, 1968, proof of death was not made to the Respondent until November 15, 1968, and payment was denied and the policy rescinded by the Respondent by letter dated December 18, 1968.

As noted above, the specifications of error argued before the Court of Appeals by Petitioners were restricted to a finding of fact and a conclusion of law dealing only with the fraudulent nature of the misrepresentations and concealment of facts made by the insured in his applications for reinstatement. Matters of the Respondent's post application conduct, waiver and estoppel were never raised before nor considered by the courts below. These matters accordingly should not be considered by this Court.

CONCLUSION

For the reasons presented above it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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